

Litigation – Casenote

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Banking Communication Non-binding and Burden-sharing Approved: *Kotnik*

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Judgment of the Court (Grand Chamber) 19 July 2016, *Tadej Kotnik and Others v Državni zbor Republike Slovenij* (526/14)

On those grounds, the Court (Grand Chamber) hereby rules:

1. The Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') must be interpreted as meaning that it is not binding on the Member States.

2. Articles 107 to 109 TFEU must be interpreted as not precluding points 40 to 46 of the Banking Communication in so far as those points lay down a condition of burden-sharing by shareholders and holders of subordinated rights as a prerequisite to the authorisation of State aid.

3. The principle of the protection of legitimate expectations and the right to property must be interpreted as not precluding points 40 to 46 of the Banking Communication in so far as those points lay down a condition of burden-sharing by shareholders and holders of subordinated rights as a prerequisite to the authorisation of State aid.

4. Articles 29, 34, 35 and 40 to 42 of Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, must be interpreted as not precluding points 40 to 46 of the Banking Communication in so far as those points lay down a condition of burden-sharing by shareholders and holders of subordinated rights as a prerequisite to the authorisation of State aid.

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5. The Banking Communication must be interpreted as meaning that the measures for converting hybrid capital and subordinate debt or writing down their principal, as provided for in point 44 of that communication, must not exceed what is necessary to overcome the capital short-fall of the bank concerned.

6. The seventh indent of Article 2 of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions must be interpreted as meaning that burden-sharing measures such as those provided for in points 40 to 46 of the Banking Communication fall within the scope of the concept of ‘reorganisation measures’, within the meaning of that provision of that directive.

I Introduction

On 19 July 2016, the CJEU decided the *Kotnik* case concerning State aid, EU soft law, corporate law and insolvency law. The wide spectre of legal subjects touched upon shows that the case is important not only for constitutional and State aid law, but also for the research field on regulatory private law.¹ It impacts banking contracts throughout the EU. The importance of the case is underlined by the fact that the CJEU decided the case in the Grand Chamber.

In short, the CJEU ruled that the Commission’s Banking Communication from 2013² is not binding on Member States. It considered the Banking Communication’s provisions on burden-sharing to comply with EU primary law including State aid provisions, the right to property and the principle of protection of legitimate expectations. The CJEU also found that the burden-sharing regime is compatible with Directive 2012/30/EU which generally requires that a capital alteration be decided by the general shareholder meeting. However, the burden-sharing regime is limited by the principle of proportionality since it may not exceed what is necessary to counter the capital shortfall. After a short outline of the facts and legal background, this case note will address each of the CJEU’s findings and discuss their implications for other areas of EU law.

¹ Founded on H.-W. Micklitz, ‘The Visible Hand of European Regulatory Private Law – The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation’ (2009) *Yearbook of European Law* 3; fundamental with regard to banking regulation S. Grundmann, ‘The Banking Union Translated into (Private Law) Duties: Infrastructure and Rulebook’ (2015) *European Business Organization Law Review* 357.

² Hereinafter referred to as Banking Communication.

II Facts and Legal Background

As a result of the financial crisis, several Slovenian banks came close to the brink of insolvency in 2013. In order to be able to recapitalise them in conformity with EU law, Slovenia amended its Banking Act in order to fulfil the burden-sharing criteria of the Banking Communication.³ On 17 December 2013, the Bank of Slovenia ordered exceptional measures concerning five banks by recapitalising two, rescuing one and winding up two of them.⁴ The day after, the Commission authorised Slovenian State aid for those five banks.⁵ The Bank of Slovenia used exceptional measures including the writing off of equity capital, hybrid capital and subordinated debt.⁶ The latter two are financial instruments between shares and ordinary debentures. In case of insolvency, holders of hybrid capital and subordinated debt are paid after ordinary debt, but before equity capital.⁷ Engaging in this increased amount of risk is rewarded by a higher rate of return. Holders of such instruments felt the Banking Act violated their right to property and legitimate expectations. Supported by the Slovenian Council of State and the Slovenian Ombudsman, they therefore brought claims for review of constitutionality before the Slovenian Constitutional Court.⁸ In the light of the Banking Act's genesis and its purpose to transpose the Banking Communication into Slovenian law, the Slovenian Constitutional Court needed to clarify if the Banking Communication was binding and if it complied with primary and secondary EU law. Feeling limited in its powers to interpret EU law and excluded from ruling on its validity, it referred for the first time ever to the CJEU asking for a preliminary ruling.⁹

3 *Zakon o spremembah in dopolnitvah Zakona o bančništvu* (ZBan-1L), Official Gazette of the Republic of Slovenia, No 96/13; for a more detailed description of the legal background in Slovenia A. Vlahek and M. Damjan, 'European Commission's Banking Communication: Question of Validity in the Slovenian Banking Bail-in Puzzle' (2016) *European State Aid Law Quarterly* 458, 459–461.

4 Case 526/14 *Tadej Kotnik and Others v Državni zbor Republike Slovenij* 19 July 2016 (CJEU) para 24.

5 *Ibid* para 25.

6 *Ibid* para 26.

7 *Ibid* para 27.

8 *Ibid* para 28.

9 *Ibid* para 29; *OJEC* C 81/3, 9 March 2015.

III Non-binding Character of the Banking Communication and the CJEU's Missing Answer to Pressing Questions for EU Soft Law

The CJEU rules that the Commission's Banking Communication is not binding for Member States. Its reasoning is clear and formal. The CJEU states that the Communication is not intended to have any binding effect externally, but rather expresses an act of self-limitation by the Commission.¹⁰ The Commission is given discretion to authorise State aid as being compatible with the internal market according to Article 107(3)(b) TFEU if the State aid remedies a serious disturbance in the economy of a Member State. In the aftermath of the financial crisis, the Commission lawfully exercised this discretion partly by binding itself to certain standards expressed in the new Banking Communication. According to the CJEU, it is bound to permit State aid which complies with the Banking Communication.¹¹ However, the Commission still has discretion to grant State aid which does not comply with the requirements of the Banking Communication.¹² In this formal way, the CJEU concludes that the Banking Communication is not binding on Member States.¹³

At first sight, this result is not surprising since the Communication was not adopted as one of the binding measures of EU law enumerated in Article 288 TFEU. This view is confirmed by doctrinal reactions to *Kotnik*.¹⁴ However, the CJEU seems to avoid replying to the underlying question. The Slovenian Constitu-

¹⁰ *Ibid* para 43.

¹¹ *Ibid* para 40.

¹² *Ibid* para 41.

¹³ *Ibid* para 44 *et seq.*

¹⁴ Vlahek and Damjan, n 4 above, 462; J.H. Binder, 'Wirksamkeit der EU-Bankenmitteilung und Auswirkungen auf nationales Recht; unionsweite Wirkungserstreckung für Abwicklungsmaßnahmen nach autonomem Recht' (2016) *Wertpapier-Mitteilung Entscheidungsanmerkungen zum Wirtschafts- und Bankrecht WuB* 719; A. von Bonin and M. Olthoff, 'Zulässigkeit der Bankenmitteilung und der Gläubigerbeteiligung bei der Rettung und Abwicklung von Banken' (2016) *Europäische Zeitschrift für Wirtschaftsrecht* 778, 780; I. Triantafyllakis, 'Italienische Banken: Wenn nicht alle Wege zum Bail-in führen' (2016) *Wertpapier-Mitteilungen Zeitschrift für Wirtschafts- und Bankrecht* 2248, 2251 *et seq.*; V. Ferraro, 'La risoluzione delle crisi bancarie e gli aiuti di Stato: alcune riflessioni sui principi delineati dalla recente giurisprudenza della Corte di giustizia dell'Unione Europea' (2016) *Rivista Italiana di Diritto Pubblico Comunitario* 1591; A.J. Tapia Hermida, 'Ayudas de Estado a los bancos en el contexto de la crisis financiera' (2016) *XLI La Ley: Unión Europea* no 41, 17; J. Morel-Maroger, 'Droit bancaire et financier international : Crise bancaire – Restructuration des banques – Validité des mesures adoptées – Protection du système bancaire – Conséquences sur les investisseurs et les déposants – Conformité au droit de l'Union européenne' (2016) *Banque et Droit* no 170, 6 December 2016.

tional Court is aware of the formally non-binding character and thus asks with respect to the legal effects *actually produced* if the Banking Communication is not *de facto* binding.¹⁵ In fact, all actors, ie Member States and banks, feel *de facto* bound by it because they do not want to take the risk of a restructuring failure if the Commission does not approve the State aid. The CJEU rejects a gradual approach to conceiving the binding character of legal norms by formally limiting the Banking Communication's effects to the Commission.

In his Opinion on *Kotnik*, Advocate General Nils Wahl explicitly addresses the question of *de facto* binding character.¹⁶ In the light of the absence of legislative powers of the Commission under Articles 107 and 108 TFEU, he stresses that the Commission would exceed its powers if it adopted binding general and abstract rules.¹⁷ Advocate General Wahl therefore denies any *de jure* or *de facto* binding character to the Commission's guidelines even though he concedes that they might have an 'incidental or indirect' effect on the Member States.¹⁸ He recognises that it might be difficult for Member States to persuade the Commission to exercise its discretion under Article 107(3)(b) TFEU outside the Banking Communication by granting State aid which does not comply with the burden-sharing regime.¹⁹ He also admits that governments are likely not to take that risk if a major bank is in financial distress.²⁰ However, he declares this compliance to be a merely factual question of expediency without true legal relevance.²¹ According to him, aid can be compatible with the Treaties outside the Banking Communication's burden-sharing regime, e.g. if the proposed solution is less costly than burden-sharing measures for reasons of procedural obstacles.²²

In a broader context, *Kotnik* is emblematic of the EU administrative law's recurring problem that soft law measures often express the lack of competences for enacting hard law measures. Notwithstanding the lack of binding character, the affected actors *de facto* abide by them, showing that they consider them to be binding to a certain degree. This phenomenon is well known for guidelines of EU

¹⁵ Case 526/14 *Tadej Kotnik and Others v Državni zbor Republike Slovenij* 19 July 2016 (CJEU) para 30.

¹⁶ Opinion of AG Wahl, Case 526/14 *Tadej Kotnik and Others v Državni zbor Republike Slovenij*, delivered on 18 February 2016, para 32.

¹⁷ *Ibid* para 36 *et seq.*

¹⁸ *Ibid* para 40; interesting on this point A. Bouchagiar, 'The Binding Effects of Guidelines on the Compatibility of State Aid: How Hard is the Commission's Soft Law?' (2017) *Journal of European Competition Law and Practice* 157, 164 (especially footnote 79).

¹⁹ *Ibid* para 42.

²⁰ *Ibid* para 43.

²¹ *Ibid* para 43.

²² *Ibid* para 44.

agencies such as the European Supervisory Authorities (ESAs)²³ ESMA, EBA and EIOPA.²⁴ There, the main reason for using soft law measures is the CJEU's *Meroni* doctrine which impedes the Commission from sub-delegating discretionary executive powers to agencies.²⁵ Of course, *Kotnik* is different in that the Commission has the power to adopt decisions in State aid questions with binding effect,²⁶ whilst the ESAs do not have such power.²⁷ However, the Banking Communication also concerns the legal core of the Commission's exercise of discretion and the need for leeway where the Treaties provide it with discretion. Hence, the Banking Communication and the ESA's guidelines or technical standards are comparable in so far as they express the Commission's limited ability to restrict its discretionary powers. The denial of binding character to those measures is due to the imperfection of EU primary law. This should not dispense us from rethinking the concept of binding character in a more gradual way though.

Problems arise especially with regard to remedies against such measures because neither national nor EU law remedies are sufficient so that a complicated combination of both is necessary.²⁸ Denying any binding legal effect of the Banking Communication means that neither EU law nor the jurisdiction of the CJEU as a consequence reign fully in these difficult restructuring questions concerning State aid. The same goes for guidelines issued by the ESAs.²⁹ On the one hand, this regulatory vacuum will be filled by national legislators and national courts. Since the binding measures implementing the burden-sharing regime will be imposed on a national level, actors will always have to seek national remedies. This leads to a retreat of EU law in matters quite crucial to it. On the other hand, questions of interpretation regarding the Banking Communication or other EU

23 The three ESAs are the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA).

24 On the possible binding character of EBA guidelines S. Capiello, 'The EBA and the Banking Union' (2015) *European Business Organization Law Review* 421, 429 *et seq.*

25 Case 9/56 *Meroni v High Authority* [1957-58] ECR 133 (CJEU).

26 Art 107(3), 108(1) TFEU.

27 Eg for EBA: art 17–19 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC; the same goes for ESMA and EIOPA in the parallel Regulations establishing them: Regulation (EU) No 1095/2010 (ESMA) and Regulation (EU) No 1094/2010 (EIOPA).

28 With regard to ECB measures in the Single Supervisory Mechanism H. Berger, 'Rechtsanwendung durch die EZB im Single Supervisory Mechanism (SSM) – Teil II' (2016) *Wertpapiermitteilungen Zeitschrift für Wirtschafts- und Bankrecht* 2361, 2367 *et seq.*

29 This question has been raised for ESMA guidelines by T. Tridimas, 'Financial supervision and agency power: reflections on ESMA', in N. Shuibhne and L. Gormley, *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford: Oxford University Press, 2012) 55, 71.

soft law acts can be referred to the CJEU even though they are non-binding.³⁰ This fragmentation of remedies for the same case represents an unhappy consequence of the lacking binding character of the Banking Communication due to primary law imperfection. A treaty change would be recommended for reasons of practicality. That said, the happy side for Member States and banks is that they can always try to persuade the Commission to exercise its discretion and that their particular case is compatible with Article 107(3)(b) TFEU.

IV Compatibility of Burden-sharing with State Aid, Principle of Legitimate Expectations, Right to Property and Principle of Proportionality

The CJEU rules that the Banking Communication's burden-sharing requirements are compatible with EU primary law, particularly with the State aid provisions, the principle of legitimate expectations, the right to property and the principle of proportionality.

As to the State aid provisions, the CJEU first adopts the Commission's stance that State aid for banks can be necessary to remedy serious disturbances in the economy of Member States pursuant to Article 107(3)(b) TFEU, especially in a financial crisis and in light of the spill-over effects to the whole economy.³¹ The CJEU approves the Commission's use of its competence by accepting the criterion of burden-sharing measures as a suitable restriction of State aid because it prevents distortion of competition and moral hazard.³² Instead of leaving the material question to the Commission's discretion, the CJEU goes further and strengthens the Commission's argument by inferring the burden-sharing requirement from general EU primary law. Thus, preventing distortions of competition and preventing moral hazard are lifted to the rank of EU constitutional reasons and burden-sharing is considered to be necessary for the internal market integrity.

The principle of legitimate expectations was the pillar on which the claimants argued that the Banking Communication should not apply to a case which was notified before the Banking Communication's entry into force but only decided

30 An exemplary case of reference for interpretation with respect to a non-binding Commission recommendation is Case 322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989] ECR 4407 (CJEU).

31 Case 526/14 *Tadej Kotnik and Others v Državni zbor Republike Slovenij* 19 July 2016 (CJEU) para 49 *et seq.*

32 *Ibid* para 56 *et seq.*

afterwards. The CJEU holds that the principle does not protect the shareholders and subordinated creditors affected by the burden-sharing measures because they did not have legitimate expectations. The principle requires precise, unconditional and consistent assurances.³³ In areas where EU institutions enjoy discretion such as State aid for banks, however, there cannot be a legitimate expectation that an EU institution will exercise its discretion in the same way in the future according to the CJEU.³⁴

The CJEU also denies a violation of the right to property. On the one hand, the CJEU points to the fact that Banking Communication does not require any specific measure to implement the burden-sharing regime.³⁵ On the other hand, it underlines that shareholders and subordinated creditors freely bear the risk of losing the share's or credit's value be it by losing in case State aid is granted or be it by losing in the case of bankruptcy.³⁶ This is underlined by the fact that point 46 of the Banking Communication applies the 'no creditor worse off principle', ie no creditor is treated worse in the scenario where State aid is granted than they would have been treated in insolvency proceedings.³⁷

Faced with the criticism of the lack of proportionality, the CJEU unsurprisingly rules that the burden-sharing measures need to be implemented with regard to the principle of proportionality.³⁸ The question regarded point 44 of the Banking Communication pursuant to which subordinated debt needs to be converted or written down, in principle, before State aid is granted. The CJEU holds that subordinated rights only have to be converted or written down as far as it is necessary to overcome the capital shortfall, thus reinforcing the principle of proportionality.

V Compatibility of Burden-sharing with Corporate Law

The Banking Communication was not only challenged for violating primary EU law, but also for being incompatible with secondary EU law, namely Articles 29,

³³ *Ibid* para 62; Case 537/08 P *Kahla Thüringen Porzellan v Commission* [2010] ECR I-12917 (CJEU) para 63; Case 630/11 P to 633/11 P *HGA and Others v Commission* 13 June 2013 (CJEU) para 132.

³⁴ Case 526/14 *Tadej Kotnik and Others v Državni zbor Republike Slovenij* 19 July 2016 (CJEU) para 66.

³⁵ *Ibid* para 72.

³⁶ *Ibid* para 73, 75.

³⁷ *Ibid* para 77.

³⁸ *Ibid* para 102.

30, 34, 35 and 40 to 42 of Directive 2012/30. These provisions require a decision by the general meeting of the company in order to allow for a capital increase or reduction. The claimants criticised that the Banking Communication does not require burden-sharing measures to be approved by the general meeting. The CJEU's answer is twofold. First, it points to the fact that the Banking Communication is indifferent to the measure's nature and to its legal procedures. Second, the CJEU holds that the Directive 2012/30 only aims at internal market harmonisation for shareholders' protection in the normal course of business.³⁹ Thus, it does not preclude crisis measures – eg under the Banking Communication – which are adopted without the general meeting's consent.⁴⁰

In the same spirit, the CJEU rules that burden-sharing measures adopted according to the Banking Communication are 'reorganisation measures' in the meaning of the seventh indent of Article 2 of Directive 2001/24.

VI Consequences for EU Banking Contracts

Kotnik has a great impact on EU banking law. Since the Banking Communication of 2013, the EU architecture of bank resolution has rapidly evolved. In particular, the Bank Recovery and Resolution Directive⁴¹ (BRRD) has introduced new resolution measures both impacting State aid law⁴² and modifying national contract and insolvency law.⁴³ For the Euro area, this was underpinned by the institutional framework of the Single Resolution Mechanism as part of the Banking Union.⁴⁴ Since the BRRD contains the same spirit of modern resolution as the Banking Communication and takes over some of its elements by rendering

³⁹ *Ibid* para 87.

⁴⁰ *Ibid* para 89.

⁴¹ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

⁴² K. Lanoo, 'Bank State Aid under BRRD and SRM' (2014) *European State Aid Law Quarterly* 630.

⁴³ J.H. Binder, 'The position of Creditors under the BRRD', in Bank of Greece's Center for Culture, Research and Documentation (ed), *Commemorative Volume in memory of Professor Dr Leonidas Georgakopoulos* (Athens: Bank of Greece, 2016) 37.

⁴⁴ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010.

them binding, *Kotnik* has an impact on the BRRD. Against the temporary solution of bailing out banks with taxpayers' money during the financial crisis, both the Communication and the BRRD change paradigms by holding bank shareholders and subordinated creditors partially accountable for the bank's capital shortfalls.⁴⁵ The BRRD furthermore conveys stronger powers to resolution authorities,⁴⁶ renders early intervention mechanisms strong⁴⁷ and introduces resolution planning requirements⁴⁸ and bail-in mechanisms.⁴⁹

In *Kotnik*, the CJEU gives hints that it approves of this new approach to resolution. First, the CJEU approves the principle of burden-sharing not only to be a valid criterion for State aid decisions under Article 107(3)(b) TFEU, but also to be necessary for conformity with EU law because it avoids disruptions of competition and moral hazard.⁵⁰ This elevation of the burden-sharing measures to the level of constitutional State aid law means that also the BRRD burden-sharing and bail-in measures will be approved of by the CJEU in principle. It is interesting that the CJEU recurs to the fundamental principle of market distortion avoidance. Thus, it returns to the principles of State aid law from before the crisis where State aid for bank rescues was set as ultima ratio. This element clearly shows that the CJEU agrees with the Commission on trying to terminate the emergency reaction⁵¹ and coming back to business as usual. It is also striking that the CJEU places the behavioural incentives of burden-sharing to reduce moral hazard as a pillar of the internal market integrity. This means that the CJEU is open to incentive-based differentiation between different creditors who are held accountable via bail-in mechanisms under the BRRD.⁵² It is also to be expected that the CJEU will, just

⁴⁵ Point 23 Banking Communication; Recitals 1, 5, 31, 67 BRRD; a good overview of the genesis of both the Banking Communication and the BRRD is provided by S. Lucchini, J. Moscianese, I. de Angelis and F. Benedetto, 'State Aid and the Banking System in the Financial Crisis: From Bail-out to Bail-in' (2017) *Journal of European Competition Law and Practice* 88.

⁴⁶ Art 63, 37–42 BRRD.

⁴⁷ Art 63, 27–35 BRRD.

⁴⁸ Art 10–14 BRRD.

⁴⁹ Art 43–62 BRRD.

⁵⁰ Case 526/14 *Tadej Kotnik and Others v Državni zbor Republike Slovenij* 19 July 2016 (CJEU) para 57–58.

⁵¹ Praising AG Wahl's Opinion for a new approach to emergency law, even though for restricting the Commission's competence in emergency bank rescue P.M. Rodriguez, 'A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis' (2016) *European Constitutional Law Review* 265, 272.

⁵² The incentive-based approach of the bail-in mechanism is expressed by the legislator in Recital 67 BRRD.

like in *Kotnik*, find the BRRD bail-in in principle not to infringe the fundamental right to property of subordinated creditors and shareholders.

Second, the CJEU explicitly refers to the BRRD in *Kotnik* in two occasions by ruling that the harmonisations brought by the BRRD have no limiting effect retroactively, but rather leave regulatory leeway to the Commission and its Banking Communication.⁵³ This parallel conceptualisation of the Banking Communication and its burden-sharing measures shows that the CJEU conceives of the BRRD and the Banking Communication as a harmonious evolution of banking resolution lawfully prioritising bail-in and strong regulatory action. The CJEU does not follow the argument that a later strengthening of rules means that the general clauses were to be interpreted in a broader sense before.⁵⁴ With regard to the BRRD, it is to be expected that the CJEU considers its burden-sharing regime to be inherent in EU law even before its concretisation. Cases dating back before the Banking Communication had better not be brought relying on the prior regime. For the future, this might imply that the CJEU will also approve of further strengthening of the BRRD burden-sharing regime. That said, this regards only the fundamental question of general primary law compatibility. The tricky questions lying in the details of the bail-in mechanism have not been answered yet and will be adjudicated only once the mechanism has been used. The resolution of Banco Popular Español S.A. on 7 June 2017 is to be considered a starting point since it is the first resolution under the BRRD.

Against this background, cases challenging the BRRD, SRM and their resolution measures might force the CJEU to rule in a more differentiated manner on bail-in and the burden-sharing mechanism in the future. From an academic point of view unfortunately, the first three promising requests for preliminary rulings on questions regarding the BRRD have been taken back.⁵⁵ However, further cases are to be expected.

⁵³ Case 526/14 *Tadej Kotnik and Others v Državni zbor Republike Slovenij* 19 July 2016 (CJEU) para 93 and 112 *et seq.*

⁵⁴ *Ibid* para 92 *et seq.*, 111–113.

⁵⁵ Case 394/16 *FMS Wertmanagement AöR v Heta Asset Resolution AG*, request for a preliminary ruling from the Landgericht Frankfurt am Main (*OJEU* C 419, 14. November 2016), case removed from the register on 21 November 2016 (*OJEU* C 86/22, 20 March 2017); Case 309/16 *Kärntner Ausgleichszahlungs-Fonds v Finanzmarktaufsichtsbehörde (FMA)*, request for a preliminary ruling from the Bundesverwaltungsgericht (*OJEU* C 335, 12 September 2016), case removed from the register on 18 January 2017 (*OJEU* C 129/14, 24 April 2017); Case 282/16 *RMF Financial Holdings Sàrl v Heta Asset Resolution AG*, request for a preliminary ruling from the Handelsgericht Wien (*OJEU* C 314, 29 August 2016), case removed from the register on 25 November 2016 (*OJEU* C 86/22, 20 March 2017).